Lord Wright, "The estoppel could not arise in this case. This ground is enough to distinguish the present case from any other case in which an estoppel has been found."

No other authority has been cited in support of the proposition that a judgment by default cannot raise an estoppel *per rem judicatam*. My own researches in this direction have been unproductive, and I am compelled to conclude that, within the limits laid down by Lord Maugham and Lord Wright, a judgment by default is as good as any other to raise an estoppel. For an Indian decision that an *ex parte* decree operates as *res judicata* in a suit for rent, see *Shib Chandra Talukdar* v. *Lakhi Priya Guha* [10]. It is therefore not open now to the defendant to say that a judgment *ex facie* for rent was in truth a judgment for interest. I accordingly hold that the plea of estoppel is good. Costs in the cause.

Order accordingly.

Solicitors: *T. K. Sen & Co.; Lovelace & Hastings.*

UDAYAR ALAGAN & ORS. v. PUBLIC PROSECUTOR

[C.A. (Thomson C.J., Good J.A., Azmi J.) October 23, 1961]

[Ipoh — F.M. Criminal Appeal No. 29 of 1961]

Criminal Law and Procedure — Murder — Penal Code, s.302 — Case depending upon credibility — Statement from dock.

Although an accused person is within his legal rights when he elects to make a statement from the dock instead of giving evidence from the witness-box, in a case which must in the event depend on credibility, he takes this course at his own peril.

The appellants were charged with murder under section 302 of the Penal Code. There was evidence which made out that charge, if it was believed. There was evidence by the appellants to the contrary though two of them made statements from the dock instead of giving evidence from the witness-box. On appeal,

Held: the evidence and the substance of the defence were adequately put to the jury, and the jury had the benefit of listening to the witnesses themselves.

Case referred to:—

(1) *Shimmin's Case* 15 Cox C.C. 122, 124.

COURT OF APPEAL.

Jag-Jit Singh for the appellants.

B. T. H. Lee (Deputy Public Prosecutor) for the respondent.

Thomson C.J. (delivering oral judgment): These four appellants were convicted for murder in contravention of section 302 of the Penal Code.

The charge was that on 8th April this year in some labourers' lines near Batu Gajah they killed a man named Jeevanandam in circumstances which amounted to murder and that this was done when they were acting together and in furtherance of a common intention which involved the deliberate killing of the deceased.

There was evidence which made out that charge, if it was believed. There was evidence by the appellants to the contrary, though here it must be observed that two of them took the dangerous course of making a statement from the dock instead of going into the witness-box and giving evidence. An accused person is, of course, entirely within his legal rights when he elects to take that course, but in a case which must in the event depend on credibility he takes it at his own peril. The rule was stated in *Shimmin's* case [1] in 1882 by Mr. Justice Cave in a passage which, so far as I am aware (and I am quite prepared to be told I am wrong), has never been criticised:—

> "A prisoner, though defended by counsel, may, if he chooses, himself make his statement to the jury. He ought to be heard in his defence, and have the opportunity of making his explanation of the circumstances proved against him. True, his statement was not made on oath, and that he was not liable to be cross-examined by the prosecuting counsel, and what he said was therefore not entitled to the same weight as sworn testimony."

In any event, to return to the instant case, in our view there was evidence, if it was believed, which made out the guilt of all four appellants. That evidence was accurately put to the jury and the defence was also adequately put to them by the learned trial Judge in a long and careful summing-up with which we can find no fault and the criticism of which amounts to no more than that it was not as favourable to the appellants as counsel would have liked it to have been.

The direction as to burden of proof has been criticised. Of course there are individual sentences in that direction which are open to criticism but the direction as a whole in our view was adequate and well supported by authority.

Again, it is true that every detail of the case for the defence, that every word said in evidence was not put to the jury. That is also true. In our view, however, the substance of the defence was adequately put to the jury and in any event they had the benefit of listening to the witnesses themselves.

In all the circumstances of the case we feel compelled to dismiss the appeal.

Appeal dismissed.

Re NG KANG LIM

[R. Cr. J. (Rose C.J.) October 25, 1961]

[Singapore — Criminal Revision No. 11 of 1961]

Criminal Procedure — Mandatory Order — Powers of revision of High Court under the Criminal Procedure Code (Cap. 132), s.311 — Delay in petitioning — Abuse of process of Court.

Although a mandatory order is one which is eminently appealable and for which revision is the remedy which should normally be sought, a petition for revision will not be entertained when it is made following a delay of more than nine months as this amounts almost to an abuse of the process of the Court.

PETITION.

Mary Lim (Miss) for the petitioner.

A. W. Ghows (Senior Crown Counsel) for the Crown.

Rose C.J.: In this case a Mandatory Order was made against the petitioner as long ago as the 7th of October, 1960. The Order was issued on the 22nd of November, 1960 and leniency was shown in that in the Order the petitioner was given a period of 8 days after the end of the year, that is, until the 8th of January, 1961 to comply with the Order. Today is the 25th of October, 1961 and I am asked to exercise my powers in revision under section 311 of the Criminal Procedure Code. The Order was, of course, one that is eminently appealable and in the normal course of events that would be and should be the remedy that should be sought. It seems to me, as learned Crown Counsel says, that it is almost an abuse of the process of the Court for me to be invited to hear this matter in revision now. It is far too late.

In these questions of Mandatory Orders of the kind under consideration, the points involved are simple, and if the person against whom the Order is made does not like it, he can appeal. I am satisfied that the petitioner understood full well that he could have appealed. If a petitioner does not appeal and waits for 9, 10 or 11 months, as the case may be, and then moves in revision, the inference to me is irresistible that mere delay is sought and no other purpose.

In the circumstances it would, in my opinion, be quite wrong for me to stretch my jurisdiction under section 311 of the Criminal Procedure Code to cover a case such as the present. I therefore am unable to entertain the petition, and it is refused.

Petition refused.

Solicitor: *L. Rayner.*

CHAN WING & SONS REALTY CO. LTD. v. THE ASIA INSURANCE CO. LTD.

[O.C.J. (Ong J.) November 6, 1961]

[K.L. — Civil Suit No. 136 of 1959]

Nuisance — Vibration by piling operations — Structural damage — Old building — Measure of damages — Difference between money value of property before and after damage.

In carrying out piling operations the defendants caused serious structural damage to the plaintiffs' adjacent property. The plaintiffs sued for damages a sum of $50,000 for rebuilding and replacement of their premises, and an additional sum of $720 for loss of rent for six months.

Held: (1) setting up vibration by piling operations which cause injury to another's property amounts to an actionable nuisance and accordingly the plaintiffs had a good cause of action in nuisance;

(2) the true measure of damages in such a case is not the cost of reinstatement or rebuilding, but the difference between the money value of the property before and after the damage. In the circumstances the damages should be assessed at $10,000, in addition to the sum of $720 for loss of rent.

Cases referred to:—

(1) *Hoare & Co.* v. *McAlpine* [1923] 1 Ch. 167, 176.

(2) *Moss* v. *Christchurch Rural District Council* [1925] 2 K.B. 750.

ACTION.

R. H. V. Rintoul for the plaintiffs.

A. L. Hills for the defendants.

Cur. Adv. Vult.

Ong J.: In this action the plaintiffs claim compensation for loss and damage suffered by them in the course of preparation of a site on the defendants' land for a large building which resulted in serious structural damage to the plaintiffs' premises.

The plaintiffs are the owners of Lots 105 and 85, section 49, in the Town of Kuala Lumpur, on which stand buildings of the shop-house type, including premises No. 49 Klyne Street. The defendants own the adjacent Lots 104 and 84. Their contractors started work on the site in May 1957. In preparing the foundation percussion piling was carried out, followed about six months later by excavation for constructing the basement. Damage to No. 49 Klyne Street from these operations was in fact anticipated by the defendants' consulting engineers and architects, as shown by a letter of May 9, 1957 from the defendants' solicitors to Messrs. Au-Yong Brothers, the tenants, who are the plaintiffs' solicitors. The defendants had also set aside a sum of $4,000 for making good the damage expected to follow. These anticipations were justified within a few days after piling operations started on May 27, 1957. On June 6, Messrs. Au-Yong Brothers complained of the severe vibration causing cracks in the walls of their premises and in a reply of the following day it was admitted by the defendants' solicitors that the piling work had been technically faulty. In fact no shoring had been carried out before piling began. The continuation of further piling caused increasingly serious damage to the fabric of the premises and were the subject of further complaints by the tenants in their letters of June 11, 14 and 18. Large cracks appeared in the walls and cement floor, the back wall was drawing away from the roof timber, doors and windows got out of alignment and resisted efforts to shut them, the staircase became detached from the adjoining wall and the foundations appeared to have been seriously shaken. The state of the premises rapidly deteriorated to such an extent that on June 22 a nuisance notice, under section 246 of the Municipal Ordinance, was served on the occupiers by the Municipal Architect requiring that adequate action be taken to ensure the stability of the premises. Only simple precautionary measures in the nature of first-aid were taken against the danger of the house collapsing. A second nuisance notice followed on December 6, 1957. Detailed reports